

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-974

COUNTY OF MILWAUKEE,
Applicant for Limited Intervention,

Petitioner

vs

PEOPLE OF THE STATE OF ILLINOIS,
PEOPLE OF THE STATE OF MICHIGAN,
CITY OF MILWAUKEE, THE SEWERAGE
COMMISSION OF THE CITY OF
MILWAUKEE, and THE METROPOLITAN
SEWERAGE COMMISSION OF THE COUNTY
OF MILWAUKEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS PEOPLE OF THE
STATE OF MICHIGAN IN OPPOSITION

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JURISDICTION

Petitioner claims the jurisdiction of the Supreme Court to review the Order of the Circuit Court of Appeals for the 7th Circuit dated August 24, 1978, denying intervention based on 28 USC § 1251 (1) and 28 USC § 2101 (e). Presumably, they rely on 28 USC § 1251 (a)(1) since there is no § 1251 (1). It is Respondents position that neither one of these sections

of the United States Code provide jurisdiction for the Petition as framed.

Petitioner's reliance on § 1251 (a) (1) is misplaced. That section provides the Supreme Court with original and exclusive jurisdiction of all controversies between two states. However, based on a prior decision of this Court, the case at Bar is not a controversy between two states. *Illinois v Milwaukee*, 406 US 91 (1972). Thus, § 1251 (a)(1) jurisdiction is inapplicable.

Petitioner's reliance upon 28 USC § 2101 (e) is similarly inapposite. Certiorari jurisdiction is premised upon 28 USC § 1254 (1) and the time limits for filing are specified in 28 USC § 2101 (c). That paragraph requires, in part, that:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or *decree* in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree." (Emphasis supplied).

Since the denial of intervention was an appealable order and certiorari jurisdiction is pursuant to 28 USC § 1254 (1), the 90 day time limit of 28 USC § 2101 (c) applies. Petitioner failed to apply within 90 days of the date of the order. Consequently, the Petition is out of time and the Supreme Court lacks jurisdiction. (See further rationale and citations in the argument section hereof).

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction because Petitioner failed to file for certiorari in accordance with the time limits specified in 28 USC § 2101 (c)?

2. Is the denial of Petitioner's Motion to Intervene in the Court below of sufficient importance to warrant review by this Court?

STATUTES INVOLVED

Respondent State of Michigan agrees with the content of the first paragraph of the statutory provision portion of the Petition. However, the following additional statutory provisions are of pertinence to the issues in this case:

28 USC § 1251 (a): "The Supreme Court shall have original and exclusive jurisdiction of: (1) all controversies between two or more states; * * *

28 USC § 1254 (1) "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

28 USC § 2101 (c): "Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days."

28 USC § 2101 (e): "An application to the Supreme Court for a writ of certiorari to review a cause before judgment has been rendered in the Court of Appeals may be made at any time before judgment."

STATEMENT OF THE CASE

Petitioner's statement of the case includes some misleading statements. For example, Petitioner makes reference in paragraph three (3) to the pollutant discharge limitations which will be imposed upon Defendants as a result of this litigation and compares them to general United States Environmental Protection Agency standards for discharge limitations. Impliedly, these more stringent restrictions are unreasonable. The comparison is misleading when taken out of the context of the specific findings of fact made by the Trial Court that specifically supported the discharge limitations it imposed. The generalized United States Environmental Protection Agency standard constitutes a minimum standard for discharge limitations which is applied across the board nationwide. The standard does not take into account specific local situations where more stringent limitations may be required based on specific water quality factors extant at that location. Such a comparison omits these considerations and may be misleading.

The only issue this Petition raises is the merits of the County intervention. Petitioner does not seek review of the trial court's findings and/or remedy.

With respect to the sequence of dates set forth, it is important to note how clearly they reflect a generally dilatory response by the Petitioner to this entire proceeding. Over six (6) years elapsed between the filing of the litigation in 1972 and Petitioner's Motion for Intervention. Petitioner waited nearly ten (10) months following the rendering of the highly publicized judgment of the Trial Court before filing their Motion to Intervene in the Court of Appeals. Again, following the denial of their Motion to Intervene in the Court of Appeals, Petitioner waited one hundred eleven (111) days to file a petition for writ of certiorari in this Court.

ARGUMENT

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THE PETITION FOR CERTIORARI WAS FILED OUT OF TIME.

It is the position of the Respondent State of Michigan that the Petition herein should have been filed within the ninety (90) day time limit specified in 28 USC § 2101 (c). Petitioners filed their Motion for Intervention and Motion for Dismissal on July 21, 1978. (See Appendix to Petition, page 62). While Petitioner did not so specify in their Motion to Intervene, it clearly constitutes a claim for an intervention of right pursuant to Fed R Civ P 24 (a) (2). An order denying intervention is appealable as a final order if intervention was claimed as a matter of right. *Sam Fox Publishing Company v United States*, 366 US 683 (1961); *Hines v D'Artois*, 531 F2d 726 (CA 5, 1976). A party denied permission to intervene in the Court of Appeals may petition for review of such an order. *United Automobile Workers v Scofield*, 382 US 205 (1965).

Since the denial of Petitioner's Motion to Intervene as of right constituted a reviewable order as of the date of its issuance by the Court of Appeals, the jurisdiction of this Court must be based upon 28 USC § 1254 (1) and the Petition must be filed within the ninety (90) day time limit of 28 USC § 2101 (c).

Petitioner failed to file its Petition within that ninety (90) day period and additionally failed to seek any extension of time beyond the specified time period in accordance with Rule 22, Rules of the Supreme Court of the United States. For these reasons, this Court must refuse jurisdiction of the instant Petition.

II.

THE MERITS OF THIS PETITION LACK SUFFICIENT AND IMPERATIVE PUBLIC IMPORTANCE SO AS TO JUSTIFY REVIEW IN THIS COURT PURSUANT TO § 2101 (e) AND RULE 20 OF THE RULES OF THE SUPREME COURT.

Assuming arguendo that 28 USC § 2101 (e) was interpreted in such a way as to provide a jurisdictional basis for this Petition, the facts fail to substantiate the public importance of the issues necessary under Rule 20 of the Rules of the Supreme Court. Petitioner does not seek review of the trial court's finding of fact and law or its remedy. They limit their Petition to the merits of their untimely request for intervention. Further the obviously indifferent attitude and dilatory tactics of Petitioner in seeking to protect whatever interests they believe they have in the case negate such claims. The litigation was over six (6) years old and the judgment in the Trial Court over ten (10) months in existence before Petitioner sought to intervene. Nor, once their endeavor to intervene was denied, did Petitioner show any sense of urgency in seeking of appeal. Indeed, they belatedly filed this Petition one hundred eleven (111) days after denial of their Motion to Intervene.

Secondly, Petitioner's claim that the case at Bar has broad precedential importance is without merit. The Trial Court below made very specific findings of fact and rulings of law pertinent to all the issues of the case. These included the relative cost of required treatment systems and the state of the art with respect to the technology necessary to meet the pollution limitation requirements of its judgment. These specific issues and determinations have no broad application beyond this particular case. Petitioner fails to substantiate the claim of broad precedential importance of this case. More-

over, Petitioner's claim does not meet the standard of sufficient and imperative public importance required under Rule 20 and this Court should therefore decline review.

III.

THE PETITION FAILS TO RAISE ISSUES OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW.

1. PETITIONER'S MOTION TO INTERVENE WAS UNTIMELY AND PROPERLY DENIED.

The facts showing the time elements relating to Petitioner's Motion to Intervene as of right have been previously stated. They demonstrate a total lack of diligence on the part of Petitioner. The question of the timeliness of a Motion to Intervene is to be determined by the Court below in the exercise of its sound discretion. Unless that discretion is abused, the Court's ruling will not be disturbed on review. *National Association for Advancement of Colored People v New York*, 413 US 345 (1973). In the NAACP case this Court ruled that the trial court did not abuse its discretion in denying intervention where the action had been pending for over four (4) months, and the proposed intervenor knew or should have known of its pendency. The instant case provides an even more flagrant example of untimeliness.

The burden of participation in proceedings which a party believes affects its interests and of which it is aware, falls on that particular party. A District Court did not abuse its discretion in denying as untimely a Motion to Intervene in proceedings which disposed of the assets of a bankrupt corporation where the motion was made two and one-half (2½) months after execution of judgment. *Chase-Manhattan Bank v Corporacion hotelera de Puerto Rico*, 516 F2d 1047 (CA 1, 1975). In the instant case, Petitioner waited some ten (10)

months after rendition of judgment in a highly publicized litigation prior to seeking intervention. Denial of that intervention was not an abuse of discretion.

2. MILWAUKEE COUNTY IS NOT AN INDISPENSABLE PARTY ENTITLED TO INTERVENE AS A MATTER OF RIGHT IN THIS PROCEEDING.

In the Court below, Milwaukee County contended that it should be joined as an indispensable party because it was the primary source of revenue to pay the cost of the remedy directed by the District Court. However, analysis of § 59.96 (6) to (10) of the Wisconsin statutes clearly indicates otherwise. Those statutes place the decision to raise amounts of funds for certain sewerage projects solely with the Metropolitan Sewerage Commission of the County of Milwaukee. *Thielen v Metropolitan Sewerage Commission*, 178 Wis 34, 189 NW 484 (1922); *State ex rel Milwaukee Sewerage Commission v Board of Supervisors of Milwaukee County*, 220 Wis 670, 265 NW 848 (1936). Milwaukee County functions merely as an agent to raise necessary revenue by either collecting taxes or issuing bonds according to decision of the Metropolitan Sewerage Commission. The County is not left with the discretion as to the amount of funds to be raised.

For the same reasons *Armco Steel Corporation v United States*, 490 F2d 688 (CA 8, 1974) and *Reserve Mining Company v Environmental Protection Agency*, 514 F2d 492 (CA 8, 1975) are inapplicable. The real taxing authorities, the Sewerage Commission who are parties to the case and City of Milwaukee aggressively litigated the interests of Milwaukee area taxpayers and the financial impact of the remedy provided by the District Court. The matter of costs was indeed the subject of considerable contention during the trial and were the subject of specific findings by the District Court (See Appendix to Petition page 48). As pointed out by the

Court there, the matter of debt limits and the setting of priorities for tax expenditures are essentially local concerns.

3. THE ACTION OF THE COURT OF APPEALS IN DENYING THE UNTIMELY INTERVENTION OF PETITIONER DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The facts of this case clearly indicate that Petitioner does not possess a substantial interest separate and apart from the other Defendants in this matter. With respect to costs the Petitioner is simply an agent to collect taxes or issue bonds. Therefore, a denial of their Petition to Intervene is not in conflict with *Provident Bank and Trust Company v Patterson*, 390 US 102 (1968), nor does it conflict with the decision in *Niles-Bemont-Pond Company v Iron Moulders Union*, 254 US 77 (1920). The factual and legal circumstances of this case are also clearly distinguishable from and not in conflict with those involved in *Leary v United States*, 224 US 567 (1912). Thus Petitioner's claim of conflict with other decisions is an illusory argument.

CONCLUSION

The Respondent State of Michigan submits that the Writ of Certiorari should be denied in this cause for the following reasons;

1. Jurisdiction of this Court to review is founded upon 28 USC § 1254 (1) and the Petition was filed out of time as specified in 28 USC § 2101 (c).
2. In any event the issues raised in the Petition lack sufficient and imperative public importance to justify jurisdiction under 28 USC § 2101 (e) and Rule 20 of the Rules of the Supreme Court.

3. The merits of the Petition do not warrant review because the Motion for Intervention was filed untimely below, Petitioner does not possess a substantial interest not fully and aggressively litigated below, nor is the result reached below in conflict with other decisions of this Court.

WHEREFORE, the Respondent, State of Michigan respectfully request that certiorari be denied.

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